

Message Text

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C O N F I D E N T I A L PEKING 1469

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TAGS: SCUL CH

SUBJECT: ARCHEOLOGICAL EXHIBITION - LIABILITY PROVISIONS

REF: PEKING 1440

1. WE HAVE TALKED TO A VARIETY OF OUR COLLEAGUES WHO WERE INVOLVED IN NEGOTIATING AGREEMENT FOR ARCHEOLOGICAL AGREEMENT, AND LIABILITY PROVISION WAS A DIFFICULT POINT IN NEARLY EVERY CASE. IT IS OUR IMPRESSION THAT, AS IN CASE OF PUBLICITY MATERIALS, CHINESE POSITION HAS GOTTEN PROGRESSIVELY LESS FLEXIBLE.
2. BRITISH APPEAR TO HAVE FINESSED PROBLEM OF FORCE MAJEURE BY VIEWING IT AS ONE OF FOUR CATEGORIES OF EQUAL IMPORTANCE, I.E. FORCE MAJEURE, PLANE CRASH, WAR OR WARLIKE OPERATIONS OR STRONG EARTHQUAKE. THE INTERPRETED ENGLISH TEXT AS BEING SOMEWHAT WIDER IN ITS COVERAGE THAN CHINESE VERSION WHICH USES TERM "TENG". LOGIC OF BRITISH POSITION MAY BE OPEN TO QUESTION, BUT CHINESE APPARENTLY DID NOT DISPUTE THE POINT.
3. AUSTRIANS SUCCESSFULLY PRODUCED TEXTS OF AGREEMENT IN BOTH CHINESE AND GERMAN WHICH SATISFIED THEIR NEEDS ON FORCE MAJEURE PROVISION. CHINESE ORIGINALLY PRESENTED AUSTRIANS WITH GERMAN TEXT ALONG LINES OF ENGLISH AND FRENCH AGREEMENTS. AUSTRIANS FELT THAT USE OF WORD FORCE MAJEURE ALONG WITH THREE CASES OF PLANE CRASH, WAR AND EARTHQUAKE WAS AMBIGUOUS AS TO WHETHER THESE CASES WERE ILLUSTRATIVE RATHER THAN EXCLUSIVE. AUSTRIANS ARGUED

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THAT PROPER WAY TO HANDLE PROBLEM IN GERMAN TEXT WOULD BE

TO ADD WORDS "WIE ETWA" WHICH LITERALLY MEANS "SUCH AS". CHINESE ACCEPTED THIS, AND AUSTRIANS WERE SATISFIED THAT BOTH GERMAN AND CHINESE TEXTS REFLECTED FACT THAT FORCE MAJEURE NOT LIMITED TO THREE CASES MENTIONED.

4. ON QUESTION OF PRECISE DEFINITION OF WHEN LIABILITY BEGINS AND ENDS, BRITISH TOLD AUSTRIANS THEY CONSIDERED THAT THEIR LIABILITY ENDED WHEN EXHIBIT CRATED AT MUSEUM. AUSTRIANS WENT TO CHINESE ON THIS POINT AND PRC OFFICIALS SAID THAT, REGARDLESS OF BRITISH VIEWS, IT WAS THEIR POSITION THAT LIABILITY ENDED WHEN CRATES PLACED ON AIRCRAFT AND DOOR CLOSED. SINCE THAT IS PRECISELY OUR VIEW, WE SHOULD HAVE NO PROBLEM INCLUDING THIS POINT IN OUR NOTE.

5. NEITHER SWEDES NOR CANADIANS APPEAR TO HAVE HAD MUCH DIFFICULTY WITH FORCE MAJEURE PROBLEM. SWEDISH AGREEMENT WAS DONE IN ENGLISH AND CHINESE AND LIABILITY CLAUSE IS IDENTICAL WITH BRITISH AND CANADIAN. MEXICANS APPARENTLY WERE CONCERNED ABOUT FORCE MAJEURE PROBLEM, BUT CHINESE WERE ABSOLUTELY INSISTENT ON THEIR LANGUAGE. MEXICANS FINALLY DECIDED TO SEND CHINESE A NOTE SPELLING OUT THEIR UNDERSTANDING OF FORCE MAJEURE PROVISION.

6. EXPERIENCE OF AMERICAN BUSINESSMEN IN NEGOTIATING FORCE

MAJEURE CLAUSES IN COMMERCIAL CONTRACTS MAY ALSO BE INSTRUCTIVE. FOR EXAMPLE, IN NEGOTIATIONS FOR AT LEAST ONE STEEL SCRAP SALE CONTRACT, U.S. COMPANY INSISTED THAT IMPOSITION OF STEEL SCRAP QUOTAS BY U.S. GOVERNMENT WOULD BE FORCE MAJEURE. CHINESE REFUSED TO ACCEPT THIS AND MATTER WAS HANDLED BY A LETTER FROM THE U.S. COMPANY STATING ITS POSITION WHICH THE CHINESE ACKNOWLEDGED WITHOUT DEMUR. WHEN SCRAP QUOTAS WERE IMPOSED, HOWEVER, THE CHINESE COMPLAINED ABOUT U.S. FAILURE TO FULFILL CONTRACT BUT WITHOUT TAKING ANY LEGAL STEPS TO SECURE REDRESS. SIMILARLY, CHINESE HAVE REFUSED TO ACCEPT STRIKES AS FORCE MAJEURE, AND COMPANIES HAVE STATED THEIR POSITION IN LETTERS.

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7. IF FEASIBLE, IT WOULD BE USEFUL TO HAVE DEPARTMENT'S PRELIMINARY THOUGHTS ON RESPONSE TO CHINESE POSITION ON FORCE MAJEURE PRIOR TO OUR MEETING WITH HSIAO TEH AT 1030 HOURS LOCAL TIME AUGUST 28.
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